

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, and FRIENDS  
OF THE EARTH,

Plaintiffs,

v.

U.S. DEPARTMENT OF ENERGY, U.S. DEPARTMENT  
OF AGRICULTURE, U.S. DEPARTMENT OF  
COMMERCE, U.S. DEPARTMENT OF DEFENSE, U.S.  
DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
U.S. DEPARTMENT OF HOUSING AND URBAN  
DEVELOPMENT, U.S. DEPARTMENT OF THE  
INTERIOR, U.S. DEPARTMENT OF LABOR, U.S.  
DEPARTMENT OF TRANSPORTATION, U.S.  
DEPARTMENT OF VETERANS AFFAIRS, CENTRAL  
INTELLIGENCE AGENCY, DEPARTMENT OF  
HOMELAND SECURITY, EXECUTIVE OFFICE OF  
THE PRESIDENT, FEDERAL COMMUNICATIONS  
COMMISSION, and GENERAL SERVICES  
ADMINISTRATION,

Defendants.

No. C 05-01526 WHA

**ORDER ON  
CROSS-MOTIONS  
FOR PARTIAL  
SUMMARY  
JUDGMENT**

**INTRODUCTION**

In a sequel to an earlier action and order requiring overdue agency action,  
two environmental organizations again seek enforcement of the Energy Policy Act of 1992.  
The core question concerns the extent to which the Secretary of Energy is obligated to require  
large private and municipal fleets of motor vehicles to use alternative-fuel vehicles (AFVs).  
At issue now are cross-motions for summary judgment.

**STATEMENT**

The Energy Policy Act of 1992, Pub. L. 102-486, 102 Stat. 2776, signed into law by President George H. W. Bush on October 24, 1992, enacted a comprehensive set of programs for reducing petroleum consumption and dependence on foreign oil, almost all of which were placed under the stewardship of the Secretary of Energy. One of its programs called for development and use of “replacement fuels.” This term meant “the portion of any motor fuel that is methanol, ethanol or other alcohols, natural gas, liquified petroleum gas, hydrogen, coal derived liquid fuels” and other combustibles determined by the Secretary to be “substantially not petroleum and would yield substantial energy security benefits and substantial environmental benefits.” 42 U.S.C. 13211(14). (For convenience and uniformity, all citations and references shall be to the Act as codified.)

On or before October 1, 1993, the Secretary was required, under 42 U.S.C. 13252, to establish a program to promote the development and use of domestic replacement fuels in light-duty motor vehicles. Under this program and by this deadline, the Secretary was required to consult with other agencies and to determine the technical and economic feasibility of achieving the goals of producing sufficient replacement fuels to replace:

- at least ten percent by the year 2000, and
  - at least thirty percent by the year 2010
- of the projected consumption of motor fuel in the United States for each such year, with at least half of such replacement fuels being domestic fuels.

The latter will be referred to herein as the “Thirty Percent By 2010” goal. The Secretary was required to publish in the Federal Register the results of the 1993 and followup determinations and provide for an opportunity for public comment. 42 U.S.C. 13252. No such publication in the Federal Register ever occurred, at least prior to 1998.

Of particular relevance herein, the Secretary was further required — before October 24, 1995 — “and periodically thereafter” — to examine these goals to determine if they should be

1 modified, publishing in the Federal Register the result of each examination and providing an  
2 opportunity for public comment. 42 U.S.C. 13254(a). The Act stated:

3 If, after analysis of information obtained in connection with  
4 carrying out subsection (a) of this section or section 13252 of this  
5 title, or other information, and taking into account the  
6 determination of technical and economic feasibility made under  
7 section 13252(b)(2) of this title, the Secretary determines that  
8 goals described in section 13252(b)(2) of this title, including the  
9 percentage requirements or dates, are not achievable, *the*  
10 *Secretary, in consultation with appropriate Federal agencies,*  
11 *shall, by rule, establish goals that are achievable, for purposes of*  
12 *this subchapter.* The modification of goals under this section may  
13 include changing the target dates specified in section 13252(b)(2)  
14 of this title.

15 42 U.S.C. 13254(b) (emphasis added).

16 Significantly, no such modification has ever occurred. This has been true despite  
17 acknowledgment by the agency since as early as 1998 that the goals were unachievable, as will  
18 be set forth below.

19 A different provision of the Act also called for modification of these goals. This was in  
20 the context of evaluating whether to require a private/municipal fleet AFV rule. While the Act  
21 specified AFV requirements for fleets operated by the federal government, state governments  
22 and certain so-called alternative fuel producers, another provision, concerned large private and  
23 municipal fleets, the focus of this lawsuit. As to them, the Secretary was obligated to decide  
24 whether to set fleet requirements in two stages. The first was so-called “early rulemaking.”  
25 That deadline came and went with no action and really has no continuing relevance here.

26 The second was due April 1, 1998. By then, the Secretary was required to publish an  
27 advance notice of proposed rulemaking for the purpose of:

- 28 (1) evaluating the progress toward achieving the goals of  
replacement fuel use described in section 13252(b)(2) of this title,  
as modified under section 13254 of this title;
- (2) identifying the problems associated with achieving those  
goals;
- (3) assessing the adequacy and practicability of those goals; and
- (4) considering all actions needed to achieve these goals.

42 U.S.C. 13257(c).

1 This advance notice was given in 1998 and three public hearings were held. *See* 63 Fed.  
2 Reg. 19372 (Apr. 17, 1998).

3 By January 1, 2000, the Secretary was required to publish a final rule to “determine  
4 whether a fleet requirement program was necessary.” The Act set forth a definition of  
5 “necessary”:

6 Such a program shall be considered necessary and a rule therefor  
7 shall be promulgated if the Secretary finds that —

8 (A) the goal of replacement fuel use described in section  
9 13252(b)(2)(B) of this title [*i.e.*, the Thirty Percent By 2010 goal],  
10 as modified under section 13254 of this title [never modified], is  
11 not expected to be actually achieved by 2010, or such other date  
12 as is established under section 13254 of this title, by voluntary  
13 means or pursuant to this subchapter or any other law without  
14 such a fleet requirement program, taking into consideration the  
15 status of the achievement of the interim goal described in  
16 section 13252(b)(2)(A) of this title, as modified under section  
17 13254 of this title; and

18 (B) such goal is practicable and actually achievable  
19 within periods specified in section 13252(b)(2) of this title, as  
20 modified under section 13254 of this title, through  
21 implementation of such a fleet requirement program in  
22 combination with voluntary means and the application of other  
23 programs relevant to achieving such goals.

24 42 U.S.C. 13257(e)(1).

25 Under Section 13257(g), if the Secretary determined that a fleet requirement was  
26 “necessary” within the above definition, then the Secretary was obligated to require by rule  
27 that certain specified percentages of vehicles acquired in the affected fleets be AFVs. This was  
28 to be done by January 1, 2000, a deadline extendable only by ninety days upon notice in the  
Federal Register. 42 U.S.C. 1257(h). This AFV requirement is at the core of this action.

Regarding the “necessity” evaluation, the Act recognized that the Thirty Percent By 2010  
goal might be deemed impracticable and, in that event, called for substitution of a revised goal in  
making the “necessity” determination. Specifically, if the goal was deemed by the Secretary to  
be “inadequate or impracticable and not expected to be achievable,” then the Secretary was

1 required to establish a revised goal and the revised goal was to be used in making the findings in  
2 Section 13257(e)(1). This provision warrants full quotation:

3 (2) The rule under subsection (b) or (g) of this section shall also  
4 modify the goal described in section 13252(b)(2)(B) of this title  
5 [Thirty Percent by 2010] and establish a revised goal pursuant to  
6 section 13254 of this title if the Secretary determines, based on  
7 the proceeding required under subsection (a) or (c) of this section,  
8 that the goal in effect at the time of that proceeding is inadequate  
9 or impracticable, and not expected to be achievable. *Such goal as  
modified and established shall be applicable in making the  
findings described in paragraph (1).* If the Secretary modifies the  
goal under this paragraph, he may also modify the percentages  
stated in subsection (a)(1) or (g)(1) of this section and the  
minimum percentage stated in subsection (a)(2) or (g)(2) of this  
section shall be not less than 10 percent.

10 42 U.S.C. 13257(e)(2) (emphasis added).

11 Thus, in two separate contexts, two separate provisions called for modification of the  
12 Thirty Percent By 2010 goal if it proved impracticable: the fleet-rule provision just quoted  
13 (Section 13257) and the provision for periodic review and modification quoted earlier  
14 (Section 13254).

15 The statutory deadlines came and went. There were no publications and actions by the  
16 Secretary. This led to the lawsuit and the eventual order reported at *Center for Biological*  
17 *Diversity v. Spencer Abraham*, 218 F. Supp. 2d 1143 (N.D. Cal. 2002) (EPAct I). That decision  
18 ordered the Secretary to make a decision whether to implement a municipal/private fleet rule.  
19 The Secretary requested comments and held hearings to determine the desirability of such a rule,  
20 *i.e.*, to make the necessity determination. The Secretary then issued a notice of proposed  
21 rulemaking, indicating his intention not to implement a fleet requirement. 68 Fed. Reg. 10320  
22 (Mar. 4, 2003). After further public comment, the Secretary issued a final decision, concluding  
23 that a non-federal fleet rule was not “necessary.” 69 Fed. Reg. 4219 (Jan. 29, 2004).

24 The essence of the decision was that an AFV requirement for municipalities and private  
25 fleets would make little difference in achieving the Thirty Percent By 2010 goal or, for that  
26 matter, *any* revised goal. The impact would be about 0.2 percent:

27 For purposes of the goals contained in EPAct, DOE believes that  
28 fuel replacement should be considered in the context of all  
on-highway motor fuel use, including heavy-duty vehicle fuel  
use, because the goals contained in section 502 of EPAct are to be

1 considered in the context of the “projected consumption of motor  
2 fuel in the United States.” (42 U.S.C. 13252(b)(2).) This section  
3 does not refer only to light-duty fuel use. The figures provided in  
4 these earlier reports, when adjusted to reflect the impact on all  
5 on-highway motor fuel use, show that a private and local  
6 government fleet rule — even with a fuel use requirement, have  
7 the authority to impose — would provide at most on the order of  
8 0.7–0.8 percent motor fuel replacement. After taking into account  
9 the fact that DOE has no authority to mandate fuel use, DOE  
10 estimates that a private and local government fleet AFV  
11 acquisition mandate would likely provide only about 0.2 percent  
12 motor fuel replacement.

13 69 Fed. Reg. 4226 (3d col.) (Jan. 29, 2004).

14 Furthermore, the Secretary stated that he had decided against modifying the  
15 Thirty Percent By 2010 goal:

16 DOE has decided not to propose or finalize any revisions to the  
17 replacement fuel goal because, first, DOE does not believe that  
18 EPCa requires it to revise the petroleum replacement fuel goal in  
19 order to determine whether a private and local government fleet  
20 rule is “necessary.” Revising the goal as part of this rulemaking  
21 would serve no purpose because, as indicated in the NOPR and in  
22 this final rule, the adoption of a revised goal would not impact  
23 DOE’s determination that a private and local government fleet  
24 rule provides no appreciable increase in replacement fuel use. In  
25 addition, the limited regulatory authority under Title V of EPCa  
26 and existing market factors independently warrant a finding that  
27 an AFV acquisition mandate under section 507(e) is not  
28 “necessary.” Therefore, DOE is not required under section 507(e)  
to revise the EPCa 2010 percent replacement fuel goal, since it  
would not influence DOE’s decision regarding whether or not to  
implement a private and local government fleet regulation.

69 Fed. Reg. 4229 (1st col.).

The agency also argued that the statutory goals were merely “aggressive aspirational  
petroleum reduction targets.” 69 Fed. Reg. 4229 (1st col.). The agency stated that “very little  
progress has been made toward achieving the goals.” *Ibid.* The agency alluded to pending  
executive and congressional initiatives and suggested that events and efforts subsequent to  
1992 had, in effect, rendered the AFV provisions a stranded relic.

In this action, plaintiffs seek to set aside the agency action, to require the Secretary to  
modify the Thirty Percent By 2010 goal, and then to re-determine the AFV fleet rule in light of  
the modified goal.

## ANALYSIS

More than six years has passed since the statutory deadline for the “necessity” determination and final fleet rule under Section 13257(e). In *EPAct I*, the Secretary was ordered to make the determination and either impose an AFV rule or not but at least to make the decision. After a rulemaking process, the Secretary then concluded that a municipal/private fleet rule was not necessary. He rejected a fleet rule. That would ordinarily have been the end of it. Under the rules of judicial review, agency action is presumed valid, deference is due, and a judge cannot simply substitute his or her judgment for that of the agency charged by Congress with making the decision. *See, e.g., Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 94–5 (1995).

The problem here, however, is that the Secretary violated a command of the Act. A two-step process was required by the Act. The Secretary was supposed (i) to revise the Thirty Percent By 2010 goal as needed to make it realistic and (ii) only thereafter — with the benefit of the revised goal — to determine if a fleet rule was necessary to meet the goal. The Secretary refused to revise the goal. He refused to revise it, even while acknowledging that the goal was unachievable. This was fatal error. The agency simply refused to follow the statutory procedure required for making the determination.

Again, Section 13257(e)(2) stated:

The rule . . . shall also modify the goal if the Secretary determines, based on the proceeding required under subsection (a) or (c), that the goal . . . is inadequate or impractical, and not expected to be achievable. Such goal as modified and established shall be applicable in making the findings [re necessity].

The Secretary has long been of the view that the goal is impractical and not expected to be achieved. By the time Congress amended the Act in 1998, for example, the Secretary had concluded:

*It is clear DOE will not achieve the replacement fuel goals established in section 502.* DOE estimates actual use of replacement fuel in 1996 was only 3.1 percent of total highway motor fuel—2.9 percent was oxygenates blended into gasoline and 0.2 percent was alternative fuel use. This compares to the targets of 10 percent in 2000 and 30 percent in 2010. DOE estimates alternative fueled vehicle sales would have to grow to between 35 and 40 percent of total light duty vehicle sales by 1999 and stay



1 at that level to meet the 2000 goal. The Department concedes that  
2 this is extremely unlikely to occur. DOE estimates Federal, State,  
3 and local alternative fueled vehicle programs could displace about  
4 3 percent of light duty vehicle motor fuel use in 2010, and  
5 replacement fuels in the form of oxygenates could account for an  
6 additional 4.8 to 6.7 percent of fuel use. It appears replacement  
7 fuel use in 2010 will account for 10 percent or less of motor fuel  
8 use — far short of 30 percent.

9 H. R. Rep. 105-727, at 9 (emphasis added). As early as 1998, therefore, the Secretary was aware  
10 that the replacement-fuel goals could not be met on the timeline in Section 13252.

11 The acknowledgment of unachievability continued. When the Secretary proposed a  
12 fleet-rule order in 2003 (in response to *EPA Act I*), the Secretary stated:

13 The result is that although the use of replacement and alternative  
14 fuels has increased since 1992, the overall use of these fuels  
15 relative to total petroleum consumption remains relatively small.  
16 In 1992, replacement fuels accounted for slightly less than  
17 2 percent of total motor fuel consumption; by 2001, replacement  
18 fuels accounted for less than 3 percent. *See Transportation Fuels*  
19 *2000* at Table 10. Thus, to date, very little progress has been made  
20 toward achieving the aggressive goals established by *EPA Act* and  
21 little progress will be made in the future without major new  
22 initiatives.

23 68 Fed. Reg. 10342 (2d col.) (Mar. 4, 2003).

24 There is no doubt that the original goal has long been deemed unrealistic by the agency  
25 and that, contrary to the Act, no modification of it has ever occurred.

26 In a gesture toward the goal-modification requirements, the Secretary included a  
27 discussion on the topic in the agency decision at issue. That discussion again acknowledged the  
28 hopelessness of meeting the Thirty Percent By 2010 goal and again refused to revise it. The Act  
instructed the Secretary to adopt a realistic goal before making the “necessity” determination.  
This studied refusal to modify the goal violated Section 13257(e)(2).

What is more, apart from Section 13257 and its fleet-rule process, Section 13254  
independently required modification of the goal. Such modifications were supposed to flow, as  
needed to remain realistic, from the ongoing periodic reviews required by Section 13254.  
Again, Section 13254 required the Secretary to examine the goals for achievability starting



1 October 24, 1995, and periodically thereafter; if the goal was not achievable, then a modified,  
2 achievable goal was supposed to have been substituted:

3 If after analysis of information obtained in connection with [the  
4 periodic reviews] or other information . . . , the Secretary  
5 determines that the goals . . . , including the percentage  
requirements or dates, are not achievable, the Secretary . . . shall,  
by rule, establish goals that are achievable . . . .

6 42 U.S.C. 13254(b).

7 Thus, the Act imposed a duty to modify the goals in two separate ways: via  
8 Section 13254 and via Section 13257, the former being a part of the periodic review process and  
9 the latter being part of the municipal/private fleet process. Both were violated in this case.  
10 Even today, fourteen years after the first President Bush signed the Act into law, no modification  
11 of the goal has ever been made.

12 \* \* \*

13 To this, the Secretary makes the following arguments. *First*, the Secretary argues that the  
14 benefits of an AFV rule would only be a 0.2 percent reduction and that this would be too small to  
15 make any difference in achieving any goal. This order disagrees.

16 As quoted above, Congress required that a fleet rule would be deemed necessary if  
17 (i) the Thirty Percent By 2010 goal, as modified to be realistic, is not expected to be achieved by  
18 2010 or such other modified date without such a fleet requirement and (ii) such goal would be  
19 achievable through a fleet requirement program in combination with voluntary and other AFV  
20 programs. 42 U.S.C. 13257. *These twin elements hinge on the goal as modified to be realistic.*  
21 The Secretary could only carry out the statutory test by first modifying the goal so as to be  
22 realistic. For example, if the revised goal were reduced from thirty percent to five percent,  
23 even a 0.2 percent contribution would go a tenth of the way in closing the gap between where we  
24 are now (three percent) and the revised goal (five percent). That in combination with the other  
25 AFV programs mentioned might well be enough to trigger a necessity finding. If the revised  
26 goal were four percent, then the 0.2 percent contribution would close twenty percent of the gap.  
27 This would not be meaningless.  
28

*Second*, the Secretary contends that the goals were only “aspirational.” No authority is cited for this remarkable proposition. Significantly, the goals were to be the keystone of the entire analysis delegated to the Secretary. To make the analysis sound, Congress insisted that they be revised to make them realistic. The goals were not merely “aspirational.”

*Fourth*, defendants argue that the Act provided no guidance as to how to modify the Thirty Percent By 2010 goal. This order disagrees. Both Sections 13254 and 13257 give the straightforward mandate that the Secretary implement a goal that is *achievable*. It has become clear that thirty percent is not achievable. The Secretary is required to determine the percentage that is.

\* \* \*

NEPA requires federal agencies to prepare a detailed environmental impact statement for “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(c). Nevertheless, “[a]n EIS is normally not required where agency action is mandatory.” *Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (citation omitted).

1 Thirty Percent By 2010 goal under either Sections 13254 or 13257 of the Act once the goal was  
2 deemed unacheivable. Likewise, Section 13257(e)(1) dictated that the private/municipal fleet  
3 rule “shall be considered necessary and a rule therefor shall be promulgated.”

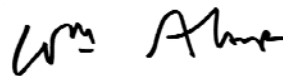
4 Moreover, the policies of NEPA were already promoted by the Act. One of the factors  
5 for determining the necessity of the private/municipal fleet rule was the “effect on greenhouse  
6 gases.” 42 U.S.C. 13257(l). Furthermore, Section 13257 required the opportunity for public  
7 comment in conjunction with the promulgation of the rule. The Act thus already ensured that  
8 the fleet rule’s impact on the public and the environment was considered. This order holds,  
9 therefore, that the Secretary is not obligated to prepare an impact statement under NEPA in  
10 either accepting or rejecting a fleet rule.

### 11 CONCLUSION

12 The agency action reported at Volume 69 of the Federal Register beginning at Page 4219  
13 is hereby **VACATED**. Each side shall submit a memorandum setting forth a realistic set of  
14 milestones with dates so that the final judgment can require efficient and just relief. Please  
15 make these submissions under oath by **MARCH 13, 2006**, each side limited to ten pages.

16  
17 **IT IS SO ORDERED.**

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19 Dated: March 6, 2006.



20 WILLIAM ALSUP  
21 UNITED STATES DISTRICT JUDGE  
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